Sabah Law Society v The Government of the Federation of Malaysia & Anor

HIGH COURT (KOTA KINABALU) — CASE NO BKI-25–14/6 OF 2022
ISMAIL BRAHIM J
6 JULY 2023

Administrative Law — Judicial review — Leave application under O 53 of the Rules of Court — Application by Sabah Law Society for leave to commence judicial review application against Government order relating to review of special grant under art 112(D) of Federal Constitution — Whether Sabah Law Society had locus standi — Whether issue was non-justiciable — Whether Sabah Law Society ought to be allowed to commence judicial review as public interest litigation — Rules of Court 2012 O 53 rr 2(4) & 3(2)

This was an application by Sabah Law Society ('the applicant') under O 53 r 3(2) of the Rules of Court 2012 ('the ROC') for leave to commence judicial review against the decision of the Government of the Federation of Malaysia ('the Government') in a Federal Government *Gazette* publication dated 20 April 2022 in which the Government had published an order namely 'The Federal Constitution (Review of Special Grant Under Article 112D) (State of Sabah) Order 2022' ('Review Order 2022'). In opposing the applicant's application, the Government argued that: (a) the applicant had no locus standi considering that the applicant was not the adversely affected person pursuant to O 53 r 2(4) of the ROC; and (b) the issue was non-justiciable. The applicant on the other hand argued that it ought to be allowed to commence the judicial review as a public interest litigation ('PIL').

Held, allowing the application for leave to commence judicial review application:

(1) The applicant had shown that leave should be granted. It was trite and not disputed that at the leave stage, the threshold to be met by the applicant was low. The applicant, a statutory body representing all Sabah advocates, was not seeking a remedy for a wrong against it, but rather upholding the rule of law and constitutional integrity. The applicant had shown that it had a real and genuine interest in the subject matter of the judicial review and was not a busy body. In the circumstances, it had the locus standi to commence the judicial review application (see paras 26–27).

(2) In determining that the applicant had locus standi, the court had also considered the Government's argument that the issue was

non-justiciable. The court did not think this argument ought to derail the applicant's arguments that it had the locus standi as here the applicant had clearly made its position very clear that it was not challenging the lawfulness of the contents of the Review Order 2022. The applicant's relief here was for public redress for breach of the Government's public duty, a constitutional duty to pay 40% entitlement for each consecutive financial year from the year 1974–2022. This issue ought not to be determined at this leave stage as it involved arguments pertaining to the interpretation of articles of the Federal Constitution on the special grant (see paras 28–29).

(3) In this case, it was clear that the applicant's action was not brought for a personal wrong or injury but to address a breach of a public duty of the Government for and on behalf of the public or the people of Sabah for which the PIL would redress the breach of their constitutional rights (see para 31).

[Bahasa Malaysia summary

Ini adalah permohonan daripada Sabah Law Society ('pemohon') di bawah A 53 k 3(2) Kaedah-Kaedah Mahkamah 2012 ('KKM 2012') untuk kebenaran memulakan semakan kehakiman terhadap keputusan Kerajaan Persekutuan Malaysia ('Kerajaan') dalam penerbitan Warta Kerajaan Persekutuan bertarikh 20 April 2022 di mana Kerajaan telah menerbitkan perintah iaitu 'Perintah Perlembagaan Persekutuan (Kajian Semula Pemberian Khas Di Bawah Perkara 112D) (Negeri Sabah) 2022' ('Perintah Kajian Semula 2022'). Dalam menentang permohonan pemohon, Kerajaan berhujah bahawa: (a) pemohon tidak mempunyai locus standi memandangkan pemohon bukanlah orang yang terjejas menurut A 53 k 2(4) KKM 2012; dan (b) isu tersebut tidak berasas. Pemohon sebaliknya berhujah bahawa ia sepatutnya dibenarkan untuk memulakan semakan kehakiman tersebut sebagai litigasi kepentingan awam ('PIL').

Diputuskan, membenarkan permohonan untuk kebenaran bagi memulakan permohonan semakan kehakiman:

(1) Pemohon telah menunjukkan bahawa kebenaran perlu diberikan. Telah menjadi undang-undang yang mantap dan tidak dipertikaikan bahawa pada peringkat kebenaran, ambang yang perlu dipenuhi oleh pemohon adalah rendah. Pemohon, sebuah badan berkanun yang mewakili semua peguambela Sabah, bukanlah ingin mendapatkan remedi untuk kesalahan terhadapnya, sebaliknya menegakkan kedaulatan undang-undang dan integriti perlembagaan. Pemohon telah menunjukkan bahawa ia mempunyai kepentingan yang sebenar dan tulen dalam perkara semakan kehakiman dan bukan penyibuk. Dalam keadaan tersebut, ia mempunyai locus standi untuk memulakan permohonan semakan kehakiman (lihat perenggan 26–27).

(2) Dalam menentukan bahawa pemohon mempunyai locus standi, mahkamah juga telah mempertimbangkan hujah Kerajaan bahawa isu tersebut tidak berasas. Mahkamah tidak fikir hujah ini sepatutnya menggagalkan hujah pemohon bahawa ia mempunyai locus standi kerana di sini pemohon dengan jelas menyatakan pendiriannya dengan jelas bahawa ia tidak mencabar kesahihan kandungan Perintah Kajian Semula 2022 tersebut. Relif-relif yang dipohon oleh pemohon di sini adalah untuk tebus rugi awam atas pelanggaran kewajipan awam Kerajaan, kewajipan perlembagaan untuk membayar 40% kelayakan bagi setiap tahun kewangan berturut-turut dari tahun 1974–2022. Isu ini tidak patut ditentukan pada peringkat kebenaran ini kerana ia melibatkan hujah yang berkaitan dengan tafsiran perkara-perkara dalam Perlembagaan Persekutuan mengenai pemberian khas tersebut (lihat perenggan 28–29).

(3) Dalam kes ini, adalah jelas bahawa tindakan pemohon tidak dibawa untuk kesalahan atau kecederaan peribadi tetapi untuk menangani pelanggaran kewajipan awam oleh Kerajaan untuk dan bagi pihak orang ramai atau rakyat Sabah yang mana PIL akan menebus rugi pelanggaran hak perlembagaan mereka (lihat perenggan 31).]

Cases referred to

Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals [2018] 1 MLJ 545; [2018] 3 CLJ 145, FC (Refd)

Malaysian Trade Union Congress & Ors v Menteri Tenaga, Air dan Komunikasi & Anor [2014] 3 MLJ 145; [2014] 2 CLJ 525, FC (refd)

Malik Brothers v Narendra Dadhich (1999) 6 SCC 552, SC (refd)

Perbadanan Pengurusan Trellises & Ors v Datuk Bandar Kuala Lumpur & Ors [2021] 3 MLJ 1; [2021] 2 CLJ 808, CA (refd)

QSR Brands Bhd v Suruhanjaya Sekuriti & Anor [2006] 3 MLJ 164; [2006] 2 CLJ 532, CA (refd)

SIS Forum (M) v Kerajaan Negeri Selangor (Majlis Agama Islam Selangor, intervener) [2022] 2 MLJ 356; [2022] 3 CLJ 339, FC (refd)

Semantan Estate (1952) Sdn Bhd v Collector of Land Revenue Wilayah Persekutuan [1987] 2 MLJ 346, SC (refd)

WRP Asia Pacific Sdn Bhd v Tenaga Nasional Bhd [2012] 4 MLJ 296; [2012] 4 CLJ 478, FC (refd)

Yang Dipertua, Dewan Rakyat & Ors v Gobind Singh Deo [2014] 6 MLJ 812, FC (refd)

Legislation referred to

Advocates Ordinance (Cap 2) s 13A(a), (e)
Federal Constitution arts 4(4), 112C, 112D, 112D(1), (2)
Rules of Court 2012 O 53 rr 2(4), 3(2)
Specific Relief Act 1950 s 44

David Fung (with Jeyan TM Marimutthu) (J Marimutthu & Partners) for the applicant.
Suzana bt Atan (Attorney General's Chambers) for the first respondent.
Ahmad Fuad b Ahmad (FT Ahmad & Co) for the second respondent.

Ismail Brahim J:

[1] This is an application for leave by Sabah Law Society's ('SLS') ex for judicial review of the Government of the Federation of Malaysia's decision and for the remedies of certiorari, declaration, mandamus, and payment of entitlement and/or constitutional damages under O 53 r 3(2) of the Rules of Court 2012 ('the ROC 2012').

[2] The decision is contained in a Federal Government *Gazette* publication dated 20 April 2022; the respondent published an order 'THE FEDERAL CONSTITUTION [REVIEW OF SPECIAL GRANT UNDER ARTICLE 112D] [STATE OF SABAH] ORDER 2022' ('Review Order 2022').

[3] The application for leave was opposed by the Federal AG (AG). The second Respondent was also heard at this leave hearing after they were allowed to intervene. After hearing the submissions of the parties, I allowed the application for leave, as I am of the view that there are merits in the applicant's arguments that they have the locus standi to institute the JR application and that they have also shown that they are entitled to commence the judicial review as a public interest litigation.

[4] The facts leading to this application have been sufficiently set out by the applicant in the cause papers and they are hardly any dispute to the facts.

[5] The basis of the objection to the leave application by the AG centres mainly around two main issues. First is the locus standi of the applicant and second the issue of the non-justiciable.

THE ISSUE OF LOCUS STANDI

[6] It is the AG's contention that the applicants have failed to show that they were within the provision of 'any person adversely affected by the decision' as stated in O 53 r 2(4) of the ROC 2012. Further it was also argued that there no decision, action or omission failing within the ambit of the said order, hence the applicant has no locus standi.

(See *Malaysian Trade Union Congress & Ors v Menteri Tenaga, Air dan Komunikasi & Anor* [2014] 3 MLJ 145; [2014] 2 CLJ 525 and *QSR Brands Bhd v Suruhanjaya Sekuriti & Anor* [2006] 3 MLJ 164; [2006] 2 CLJ 532.)

[7] Further, it was argued that to seek a declaration, the applicant must establish that he had acquired a legal status or rights against the respondents which required to be protected by declaratory orders.

[8] As the applicant had also applied for an order of mandamus, the applicant must also fulfil the conditions of s 44 of the Specific Relief Act 1950 (see *Semantan Estate (1952) Sdn Bhd v Collector of Land Revenue Wilayah Persekutuan* [1987] 2 MLJ 346).

[9] In the present case, it was also argued that the applicant has neither a sufficient personal interest nor this application is a public interest litigation.

[10] It was further submitted that by virtue of art 112D(1) of the Federal Constitution, the adversely affected person pursuant to O 53 r 2(4) of the ROC 2012 are the Governments ie, the Federal Government and the State Government of Sabah.

THE NON JUSTICIABLE ISSUE

[11] In this regard, it was submitted that the crux of this judicial review application by the applicant is the review of the special grant exercised under art 112D(1) of the Federal Constitution.

[12] It was further submitted that the exercise of this review of the special grant involves non legal factors pursuant to art 112D(2) of the Federal Constitution where the review of the special grant shall take into account the financial ability of Federal Government as well as the needs of the State Government of Sabah.

[13] In support of this issue, the AG refers to the Federal Court's decision in the case of *Yang Dipertua, Dewan Rakyat & Ors v Gobind Singh Deo* [2014] 6 MLJ 812 (TAB 15 of AGBOA p 822) as follows:

> [18] Justiciability concerns the limit upon legal issues over which a court can exercise its Judicial Authority. *If the court has no authority to adjudicate over the dispute, then it is non-justiciable.*

[14] In support of this argument the SFC has submitted at length on this issue. For the purpose of this judgment, I do not propose to set out the submission here in full as I agree with the SFC that as far as the decision on the amount of special grants reviewed under art 112D of the Federal Constitution is an executive action by both governments, taking into account fiscal and administrative considerations which are exclusively within the domain of the executive authorities;

[15] However, it is to be noted that the judicial review is not only confined to challenging the review provided by art 112D of the Constitution but it is also directed at the breach of constitutional duty of the first respondent under the constitution towards the State of Sabah.

[16] In relation to the above two issues, the applicant submitted that in regards to the issue of non-justiciable, the applicant submitted by this judicial review, the applicant is asking for the upholding of a public duty owed to the people of Sabah. That is to say, the art 112D review should have been done not later than 1974, and that since it had not, for it was only carried out in 2022, the respondents have breached their constitutional duty that have legal consequences.

[17] It was submitted that this is plainly a justiciable issue and this court undoubtedly has the ability and power to hear a dispute concerning this issue, for that is the courts' quintessential role and function: See *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545; [2018] 3 CLJ 145 (FC) (Tab 6 of ABOA at pp 131–197).

[18] In the present application for judicial review, the relief requested focus on the interpretation of the constitutional provisions in respect of the payment of the 40% entitlement and if there were a breach or breaches of the constitutional provisions, their public redresses. The applicant is not asking the court to conduct an art 112D review. An art 112D review is one to be undertaken by the first and second respondents (see the relief for mandamus).

[19] The applicant also took the position that in the present judicial review, the applicant is challenging the lawfulness of the executive's decision under statutory judicial review and not the validity of the statute for voidness under art 4(4) of the Federal Constitution. In short, it is directed to lawfulness of the executive decision under statutory judicial review (see *SIS Forum (M) v Kerajaan Negeri Selangor (Majlis Agama Islam Selangor, intervener)* [2022] 2 MLJ 356; [2022] 3 CLJ 339).

[20] As for the locus standi, the applicant submitted that the Review Order 2022 is undoubtedly 'a decision, action or omission in relation to the exercise of the public duty' under art 112D' read with art 112C. It was 'a decision, action or omission' in relation the exercise of public duty to make payment of the 40% entitlement or instead of it a grant in modification of the duty imposed on the first respondent under art 112C subject to review under art 112D. The decision expressed in the Review Order 2022 was one only to pay a special grant annually at the amounts indicated therein for the period from 2022–2026. The glaring omission was the first respondent's action not to pay the 40% entitlement for the lost years despite the fact the respondents

undertook the review in 2022 rather than the mandated time in 1974.

[21] It was further submitted that this application for judicial review falls within the category of cases in public law commonly called public interest ligitation ('PIL'). It lies within the clearest part of the spectrum of PIL which should be permitted to be undertaken in the interest of the public.

[22] It was argued that PIL is taken out in a judicial review of a public authority or officer's action or omission pursuant to the exercise of statutory powers is expressly permitted as pronounced by both the Court of Appeal and the Federal Court in the following cases:

(a) *QSR Brands Bhd v Suruhanjaya Sekuriti & Anor* [2006] 3 MLJ 164; [2006] 2 CLJ 532 (CA);

(b) *Malaysian Trade Union Congress & Ors v Menteri Tenaga, Air dan Komunikasi & Anor* [2014] 3 MLJ 145; [2014] 2 CLJ 525 (FC); and

(c) *Perbadanan Pengurusan Trellises & Ors v Datuk Bandar Kuala Lumpur & Ors* [2021] 3 MLJ 1; [2021] 2 CLJ 808 (CA).

[23] Following the ratios in these cases, there are two criteria that must be fulfilled and the applicant had satisfied these criteria. Firstly, the litigation is not brought for a personal wrong for which the claimant wants a remedy to redress its personal injury. Secondly, the litigation is brought to address a breach of a public duty for and on behalf of a section of the public who because of their want of resources would not be in a position to seek redress, and for which the PIL will redress an injustice perpetuated against the public.

[24] It was further submitted that this judicial review is a PIL brought for all the people of Sabah is hallmarked by the historical fact that the 40% entitlement was a constitutional right accorded to the people of Sabah for them to agree to form Malaysia. It was also pointed out that this fact was invariably not disputed but recognised by the firs respondent. In the circumstances, it is fit and proper that it is the applicant which brought this judicial review as it is an impartial statutory body of Sabah Advocates instituted under the Sabah Advocates Ordinance (Cap 2) whose members must have Sabah connections, interpreted to mean having domicile in Sabah. It also certainly has the capacity to commence this judicial review for the subject matter of the judicial review falls within its object. In accordance with Section 13A(a) and (e) of the Advocates Ordinance (exh SLS1 at pp 5–6 of AA), the applicant is vested with necessary statutory powers and authority 'to uphold the cause of justice without regard to its own interests or that of its members, uninfluenced by fear or favour' and 'to protect and assist the public in all matters ... Relating, ancillary or incidental to, the law'.

THE SECOND RESPONDENT

[25] In regard to the second respondent's position, the second respondent distinguishes between justiciable and non-justiciable grounds of challenge, arguing that the court can inquire into the existence of a constitutional power and its scope, but should not intervene in the exercise of that power if it has been lawfully exercised within its scope.

REASONS FOR GRANTING LEAVE

[26] After having considered the submissions of the parties, it my finding that the applicant had shown that leave should be granted. It is trite and not disputed that at the leave stage, the threshold to be met by the applicant is low (see *WRP Asia Pacific Sdn Bhd v Tenaga Nasional Bhd* [2012] 4 MLJ 296; [2012] 4 CLJ 478 (FC)).

[27] On the issue of locus standi I have considered the plaintiff's arguments that the applicant, a statutory body representing all Sabah advocates is not seeking a remedy for a wrong against it, but rather upholding the rule of law and constitutional integrity. In my view, the applicant has shown that it has a real and genuine interest in the subject matter of the judicial review, and is not a busy body. In the circumstances, it has the locus standi to commence the present judicial review application.

[28] In determining that the applicant has locus standi I have also taken into consideration the first respondent's arguments that the issue is non-justiciable. I do not think this argument ought to derail the applicant's arguments that it has the locus standi as here the applicant has clearly made its position very clear that it was not challenging the lawfulness of the contents of the Review Order 2022.

[29] The applicant's relief here is for public redress for breach of the first respondent's public duty, a constitutional duty to pay 40% entitlement for each consecutive financial from the year 1974–2022. This issue is to not be determined at this leave stage as it involves arguments pertaining to the interpretation of articles of the Federal Constitution on the special grant.

[30] In regards to the arguments by the applicant that it ought to be allowed to commence the judicial review as a PIL, I think based on the facts of this case, the applicant's application falls clearly within principles established in the ratio decidendi of *QSR Brands Bhd v Suruhanjaya Sekuriti & Anor* [2006] 3 MLJ 164; [2006] 2 CLJ 532 (CA), and *Malaysian Trade Union Congress & Ors v Menteri Tenaga, Air dan Komunikasi & Anor* [2014] 3 MLJ 145; [2014] 2 CLJ 525 which made reference to the Indian Supreme Court's ratio on what

comprises PIL in *Malik Brothers v Narendra Dadhich* (1999) 6 SCC 552.

[31] In this case, it is clear that the applicant's action is not brought for a personal wrong or injury but to address a breach of a public duty of the first respondent for and on behalf of the public or the people of Sabah for which the PIL will redress the breach of their Constitutional Rights.

[32] Based on all the above reasons, the application for leave to commence the judicial review application is allowed.

Application for leave to commence judicial review application allowed.

Reported by Dzulqarnain Ab Fatar